National Waste & Recycling Association℠

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January 28, 2016

Mr. Steven C. Riva
U.S. Environmental Protection Agency Region 2
Permitting Section, Air Programs Branch
290 Broadway
New York, New York 10007

Re: Comments Regarding Ocean County Landfill and MRPC Holdings LFGTE Operations Draft Federal Operating Permit Pursuant to Title V of the Clean Air Act (Permit #: P71-0CMH-001)

Dear Mr. Riva,

The National Waste & Recycling Association (NWRA) and the Solid Waste Association of North America (SWANA) appreciate the opportunity to offer comments on the Environmental Protection Agency's (EPA) draft Part 71 Operating Permit for Ocean County Landfill and MRPC Holdings LFGTE Operations, Permit Number: P71-0CMH-001 (Draft Permit). As leading trade organizations representing the municipal solid waste landfill sector, NWRA and SWANA are keenly interested in promoting the beneficial use of landfill gas (LFG) around the country. NWRA and SWANA are very concerned that the EPA's issuance of the Draft Permit, and the circumstances under which it has been prepared, represent a significant departure from sensible permitting policies and will constitute a disincentive to future landfill gas-to-energy (LFGTE) projects around the country.

The NWRA and SWANA represent companies, municipalities and professionals in the solid waste industry. The NWRA is a not-for-profit trade association representing private solid waste and recycling collection, processing, and management companies that operate in all fifty states. SWANA is a not-for-profit professional association in the solid waste management field with more than 8,000 members from both the private and public sectors across North America.

Between NWRA and SWANA, our members' facilities supply the LFG used to produce nearly all of the 2,000 MW of waste-based, renewable energy generated from landfills in the United States. Our comments on the Draft Permit are intended to convey our members' strong interest in these projects, which represent an economic investment in alternative renewable energy sources and the reduction in greenhouse gas (GHG) emissions; the EPA's actions should not undermine those investments and the benefits derived from these projects.

The Draft Permit Follows Years of Uncertainty for the Affected Facilities

Based on a review of the history of this matter, it appears that the EPA's release of the Draft Permit has followed a decade of back-and-forth among the affected facilities, the New Jersey Department of Environmental Protection (NJDEP) and EPA over a source determination that had long been settled in NJDEP's initial permitting efforts for each facility. The EPA's decision to reopen, reevaluate and eventually upset that determination evidences at best a poor policy decision and at worst an exercise of EPA's discretion that is well beyond the intended structure and intent of the Clean Air Act permitting programs. Far from advancing the goals of the Title V program, the EPA's actions in this matter have created prolonged uncertainty for the affected facilities, requiring a significant expenditure of costs and resources that otherwise would not have been required and likely did not create any improvement in air quality. This matter has sent an extremely negative signal to the regulated community.

We Disagree with EPA's Approach to Common Control

NWRA and SWANA believe that the EPA must make common control determinations that reflect the economic realities of LFGTE projects. The unique nature of LFGTE projects promote co-location because of the efficiencies created by the physical proximity of the energy facility to the landfill. However, in these cases, co-location is not an indicator of operational control, and therefore EPA's policy of presuming common control should not apply. In fact, for many such projects, municipal or privately owned landfill entities do not have either the financial or technical wherewithal to construct and operate a LFGTE facility. However, because the use of LFG for energy production represents a sound alternative energy investment, independent entities are willing undertake the construction and operation of the LFGTE facility. These investments, and the relationships that implement them, are not indicators of common control for air permitting purposes.

The EPA's May 2009 common control determination for the Ocean County Landfill (OCL) and the Manchester Renewable Power Corporation (MRPC) facility appears to rest on a superficial analysis. First, the EPA readily acknowledged that corporate ownership was not the relevant factor governing its determination, stating "common control can be established in the absence of common ownership. Thus, EPA looked beyond ownership to see if common control exists between OCL and MRPC." In looking beyond ownership, the EPA appears to have looked no further than the co-location of the two sources and the existence of contracts between them. Instead of acknowledging the unique nature of LFGTE projects, which promotes co-location even in the absence of actual control, the EPA reflexively applied its rebuttable presumption without examining the actual relationship between the parties. The EPA cited the "many types of agreements (site leases, gas leases, power purchase agreements, development agreements, a stock purchase agreement, a gas flare service agreement, and a grant), as well as the large number of agreements" in its determination that OCL and MRPC had failed to rebut the presumption.

NWRA and SWANA feel strongly that the mere existence of agreements between two entities does not indicate common control; quite the opposite – we believe that separate corporate entities executing an economic venture must be governed by arms-length agreements detailing the rights and responsibilities of each entity. Such complex and numerous agreements would not be necessary in a case of true

common control, where one entity has the ability to direct the activities of another. Indeed, the EPA did not include in its analysis of OCL and MRPC any examination of the day-to-day operation of the facilities, responsibilities for the compliance obligations or decisions that are the subject of Title V permitting and did not demonstrate that either entity has the ability to direct or control the decisions of the other. These factors (i.e. shared management structures, workforces, payroll, equipment, and compliance obligations) were enumerated in the oft-cited September 18, 1995 William Spratlin letter, which simultaneously urged permitting agencies to be wary of corporate relationships that appear to have been established for the express purpose of splitting facilities into separate sources for air permitting purposes. This objective seems to have been lost in the EPA's OCL determination and replaced with the simple premise that the existence of co-location and contracts constitutes common control, even where no corporate relationships are found.

NWRA and SWANA believe that EPA's common control determination in this matter represents an error in the EPA's approach to source aggregation because it fails to recognize the nature of LFGTE facilities and will ultimately discourage such projects. In order to encourage LFGTE projects, it is critically important that operating permits for these projects provide a clear division of rights and responsibilities between the landfill operator and the LFGTE facility operator, and that each entity has sole control over its own decision-making and compliance obligations. Common control determinations for facilities in which operations are not truly commonly controlled have the perverse effect of creating dependency where none existed. However, from the perspective of the permittees, it is impossible to successfully operate a landfill and LFGTE project where parties are held liable for compliance for operations upon which they do not exert operational control. According to the Statement of Basis prepared by EPA in support of the Draft Permit, compliance with the permit "may involve coordination between the landfill and LFGTE operations regarding normal daily operation, alternate operating scenarios, shutdowns and startups, reporting, monitoring, recordkeeping, modifications, and closures." EPA's position fails to recognize that if these facilities were in fact, under common control , such "coordination" would not be required because there would already be a "common controller" responsible for these issues.

In addition to day-to-day compliance obligations, enforcement risk is a significant concern. In the past, notices of violation seeking to impose significant penalties have been issued to landfill operators for alleged non-compliance that were beyond their ability to control. These instances of alleged non-compliance were related to third-party LFGTE plant operations. In some cases, significant penalties were imposed even though the landfill operator had no physical ownership of the LFG or the LFGTE plant. The solid waste industry is a heavily regulated industry that is very sensitive to the goodwill of the public, and being held responsible for the actions or inactions of an independent entity, over which the landfill operator has neither control nor the ability to control, is quite troublesome to our members.

Requiring that an independent third party energy developer and the landfill operator conduct their operations as a single source, including their combined emissions, creates a disincentive for LFGTE projects to be developed in the first instance and expanded in a manner that might re-open settled permitting decisions. Yet the EPA, through the Landfill Methane Outreach Program (LMOP), encourages the use of LFG in order to reduce GHG emissions, generate energy, and reduce fossil fuel usage. In the face of the type of common control decision made in the OCL matter and as played out through the Draft Permit, we fear that many landfills faced with aggregation and common control will simply continue to flare collected LFG without recovering renewable energy. One reason for this is that if

emissions from LFGTE facilities are aggregated with emissions from landfill operations under a single source permit, the combined emissions may trigger more stringent and costly requirements under non-attainment New Source Review (NSR) and Prevention of Significant Deterioration (PSD) permitting programs. While we laud the technology-forcing goals of the Clean Air Act, imposition of such pre-construction requirements on a landfill operator creates a major disincentive to considering a new renewable energy project because the unknown risk and significant cost increase of the project may adversely impact its economic feasibility and may adversely impact the ability of the landfill to expand, install needed equipment or otherwise upgrade its own operations.

This is not a new issue, and a case such as this not only has the ability to jeopardize future LFGTE projects, but it could also negatively impact existing LFGTE projects, with retroactive liability, re-permitting requirements, and a disincentive to expand existing plants. The associations' members, who own or operate LFGTE projects across the country, fear that this matter calls into question longstanding permitting determinations made by permitting authorities around the country, including New Jersey. NWRA and SWANA are aware of at least 70 third-party LFGTE plants across the country, which are co-located with landfills and permitted separately from the landfill, not under common control. These landfills are located in over half the states in the country and have been subject to permitting by duly authorized permitting agencies. The landfill industry believes that substantial precedent already exists to support determinations that landfills and LFGTE facilities are not under common control; however, EPA's action in this matter will likely undermine confidence in those agencies and the permitting determinations made to date.

The Draft Permit Upsets Settled Compliance Expectations

When NJDEP submitted its proposed Part 70 permit renewal with modification for MRPC to EPA in 2005, the reasonable expectation based on both NJDEP's and EPA's previous interpretations of common control was that MRPC would remain separate from the OCL.[1] Instead, EPA's decision to upset the already settled determination that OCL and MRPC constitute separate facilities launched the parties on a ten-year odyssey that has resulted in the Draft Permit. Far from improving clarity of compliance obligations, the Draft Permit creates new uncertainty and evidences a meaningfully different approach than the parties had come to expect through their initial permitting efforts. First, the Draft Permit fails to address the complexities created by its common control determination, such as how two permittees might fulfill administrative requirements that are traditionally geared toward one permittee, such as the submittal of an annual emission statement and annual and semi-annual compliance certifications. Second, EPA appears to have taken the opportunity in the Draft Permit to significantly ratchet up the cost and administrative burden of monitoring, testing recordkeeping, and reporting obligations through new "gap-filling" requirements that did not appear in prior permits issued by NJDEP, are presumably not found in the permits of similar landfill and LFGTE facilities, and in some cases are not directly required by regulation.

[1] The proposed Part 70 permit is Facility ID No.: 78901, Activity ID No.: BOP990002. Letter dated 9/7/2005 from R. Langbein (NJDEP) to S. Riva (EPA), containing NJDEP's responses to comments on the draft Part 70 renewal permit for Manchester Renewable Power Corporation/LES. Enclosures: Response to comments document, diskette providing an electronic file of the perm it. Received by EPA on 9/21/2005. The original Part 70 permit was issued by NJDEP on June 9, 1999.

Finally, in one significant substantive change, the EPA has determined that portable generators operated at OCL must now be treated as stationary engines. This determination is in direct contradiction of the EPA's own statements that portable engines moved from location to location within a facility fit within the definition of nonroad engine and do not constitute stationary units. "The term 'location' has been defined so as to permit a 'location' to exist within a facility. Section (2)(iii) of the revised definition defines 'location' as 'any single site at a building, structure, facility or installation. This definition of 'location' provides more precision in classifying an engine as nonroad if the engine is actually intended to be used in a mobile manner within a stationary source. In other words, an engine would be considered nonroad if it moves to different sites within a stationary source." (59 FR 31312 June 17, 1994). See also, http://cfpub.epa.gov/adi/pdf/adi-mact-m090038.pdf; and multiple responses to comments relating to EPA's Mandatory GHG Reporting Rule at http://www.epa.gov/sites/production/files/2015-02/documents/subpartc-rtc.pdf.

Conclusion

NWRA and SWANA support the position that the OCL and MRPC are two separate sources that are not under common control, and we oppose the position proposed by EPA Region 2 in the Draft Permit. We urge EPA to re-evaluate this decision and utilize a common sense and environmentally beneficial approach when making common control determinations for landfills and third-party LFGTE plants both now and in the future.

The NWRA and SWANA appreciate the opportunity to provide comments and recommendations, and we look forward to continuing to work with you on this and other common control issues. Should you have any questions about these comments, please call Anne Germain, Director of Waste & Recycling Technology for National Waste & Recycling Association, at 202-364-3724 or e-mail her at agermain@wasterecycling.org. You may also call Jesse Maxwell, Advocacy & eLearning Program Manager for SWANA, at 240-494-2237 or e-mail him at jmaxwell@swana.org.

Very truly yours,

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